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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1085

JOSEPH A. RICH,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

The exercise of this Honorable Court's discretionary certiorari jurisdiction in this case is opposed as there is demonstrated no special or important reason for review of the Florida Supreme Court's decision. There is involved no undetermined federal question of substance or any significant question of importance to the uniform administration of the Federal Employer's Liability Act.

QUESTIONS PRESENTED

Respondent perceives that the real points presented are:

(1) A medical doctor, listed as an approved local surgeon, is not an agent of the railroad in rendering treatment to a railroad employee on a private doctor-patient basis.

(2) Where all issues of operational negligence charged to a railroad are properly submitted to and decided by a jury, and the jury's verdict is reviewed and approved by the trial court, the state court of appeals and the state supreme court, certiorari review by this Honorable Court is not warranted.

STATEMENT OF THE CASE

Petitioner charged the railroad with a multiplicity of operationally negligent acts resulting in petitioner suffering a broken leg when he failed to mount the rear steps of the caboose of a slow-moving work train and fell to the ground. All issues concerning the alleged acts of negligence of the railroad, as well as the issue of petitioner's contributory negligence in mitigation of damages, were resolved by a jury.

A claim that petitioner prior to and at the time of his injury had suffered a work-connected dermatitis due to

railroad negligence was abandoned at the trial for lack of proof.

By an amendment to the original suit, petitioner also claimed that a Doctor Center and/or a Doctor Fox, as agents of the railroad, negligently treated him for a rash and that the railroad was consequently liable for the doctors' alleged negligence. This claim was denied by the trial court at the conclusion of the entire trial for lack of proof of agency. This ruling of the trial court was affirmed on appeal and re-affirmed by the Supreme Court of Florida on review by certiorari as a correct application of the law to the evidence in the case.

SUMMARY OF THE EVIDENCE

The operative evidentiary facts concerning the relationship of the doctors, the employee, and the railroad are simple and without material conflict.

On Monday, August 14, 1961, petitioner, who lived in St. Petersburg, Florida, was a flagman on a work train engaged in repairing a trestle 20 miles away (near Clearwater, Florida). During that day, he broke out with some kind of a rash (hives) (Tr. 134). He left the job, went to the depot at Clearwater, and was driven to a doctor by a fellow employee. He went to the office of a Doctor Center, who was among a number of doctors listed (in the back of the time table) by the railroad, but petitioner "never looked at the list," (Tr. 135). Doctor Center gave him an injection and some antihistamine pills (Benedryl and Pyrabenzamine), and he returned to work. *He paid the doctor for this professional service.* Petitioner worked the remainder of that day and the following day, Tuesday.

Because of the persistence of the rash, he marked off on Wednesday, August 16, 1961, and again sought medical attention on his own without reference to the railroad. His wife called a Doctor Fox of St. Petersburg, their family physician for many years (Tr. 119, 127). Doctor Fox was also on the list of approved local surgeons of the railroad. Doctor Fox gave petitioner ACTH and Prednisolone, and petitioner continued the antihistamine prescription given him by Doctor Center. *Petitioner paid Doctor Fox for this visit.* Petitioner marked up and worked on Thursday, August 17, 1961. He took one of the pills prescribed by Doctor Center in the morning of that day (Tr. 141), worked all day, and about quitting time (4:00 p.m.) fell and injured his leg in trying to board the train while it was moving at a slow speed (Tr. 151). Both doctors diagnosed the rash as being urticaria (hives) caused by an allergic reaction to food (tomatoes or strawberries). Neither doctor considered the treatment of the rash as a "railroad case" or in any way a work-related malady, and petitioner paid both for their medical services. The suit sought consequential damages for the injured leg, not for the rash for which Doctor Center and Doctor Fox treated petitioner.

REASONS FOR DENYING THE WRIT

Petitioner was a Private Patient of the Doctors

The first pivotal fact on the record of the case made by petitioner is that the doctors were consulted by him in a private doctor-patient relationship for treatment of a non-work related case of hives, for which petitioner paid the doctors for their services.

Railroad did not Furnish the Treatment

In apposition to the prime pivotal fact of privacy of the employment of the doctors, the record is clear that the respondent railroad "furnished" no medical treatment to petitioner for his skin rash.

Under these circumstances, these private medical practitioners could not possibly be agents or employees of the railroad. They performed no nondelegable duty of the railroad in their private medical practice, either of an operational or non-operational nature.

Proof Fatally Deficient as to Malpractice

Aside from the critical lack of agency, the proof as to the malpractice claim is fatally deficient. Assuming, *arguendo*, that the railroad had "furnished" petitioner the medical treatment by Doctors Center and Fox, there was no evidence to support a malpractice recovery. Proof of malpractice requires two evidentiary steps: the recognized standard of the medical community and a showing that the physician negligently departed from that standard. No foundation was laid as to the recognized standard and no departure therefrom was shown. *Davis v. Virginian R. Co.*, 361 U.S. 354, 358, (1960).

Medical Treatment Not an Operational Activity

It was not shown in this case that the furnishing of medical treatment to its employees was an operational activity or an operational responsibility of the respondent railroad. A railroad is held responsible for the negligence of an independent contractor or independent entity in

carrying out an "operational activity" of the railroad where such negligence results in injury to an employee, but the furnishing of medical attention by private doctors is not a part of the operations necessary to the exercise of the railroad's franchise. *Sinkler v. Missouri P. R. Co.*, 356 U.S. 326 (1958), relied upon by petitioner, involved operational negligence in connection with the movement of railway cars.

It is relevant that the *Sinkler* case, *supra*, was decided before this Court's decision in *Davis v. Virginian R. Co.*, *supra*. If the furnishing of medical treatment was an operational activity of the railroad, this Court would have so held in the *Davis* case, *supra*. It is obvious that this Honorable Court did not consider that there was any rational or legal basis to hold that the furnishing of medical treatment by a private and independent doctor formed any part of the railroad's chartered powers or operations.

As with *Sinkler*, *supra*, petitioner's reliance on *Hopson v. Texaco*, 383 U.S. 262 (1966), is misplaced. *Hopson* involved the negligence of a taxi driver hired by the defendant to carry out the *statutory duty* of the employer to transport an ill seaman to the American consulate, which duty was held to be nondelegable. No such duty is involved in the present case.

As to the responsibility of the railroad for the alleged negligence of Doctors Center and Fox, the Florida Supreme Court quite properly held that "the relationship of a doctor to a railroad may be different under varying factual circumstances. If the relationship is not that of independent contractor, but rather of employee, then the

rule announced in the district court might well not apply. In the instant case, *there is nothing to suggest that the doctors involved were anything other than independent contractors,*" (italics supplied) to which the Court might well have added, "no matter by whom they were engaged."

All Justiciable Issues Were Resolved by the Jury

Petitioner's claim for the injury to his leg was submitted to the jury on all genuine issues of fact. Petitioner's points posed as questions 2, 3, and 4 are without merit and do not warrant a digging and searching of the record of the trial by this Honorable Court. The verdict of the jury has been examined and found proper and supported by the evidence by the trial judge, the district court of appeal, and the Supreme Court of Florida.

Petitioner certainly was not entitled to a directed verdict. The court in a Federal Employer's Liability Act case cannot withdraw the issue of liability from the jury even though the proof warrants a conclusion of negligence, and this rule applies equally to the issue of employer and employee negligence. *Rogers v. Missouri P. R. Co.*, 352 U.S. 500 (1957); *Wilkerson v. McCarthy*, 336 U.S. 53, (1949). The same rule applies on appellate review. In determining whether there is evidence to support a jury verdict, the Court need only look to the evidence and reasonable inferences which tend to support the jury's verdict and on such review the Court should not substitute its view of the facts for that of the jury. *Barry v. Reading Co.*, 147 F.2d 129 (3rd Circuit), Cert. denied 324 U.S. 867, (1945).

The so-called sudden peril charge requested by petitioner did not fit the fact situation of the case at all.

The charge requested had to do with a person "placed in sudden peril not created by his own negligence" and was not predicated on petitioner trying to escape from a sudden emergency caused by the defendant's negligence. Petitioner was not in a position of peril at any time and was not trying to extricate himself from a place of personal peril. Petitioner likely confused the charge requested with the rule sometimes referred to as the "rescue" doctrine, but no such charge was sought. The "rescue" doctrine does not affect the standard of care, but merely applies the reasonable man standard to the particular circumstances. If there were circumstances under the evidence calling for a lower than ordinary standard of care on the part of petitioner, the charge of the court fully covered the situation. The jury was charged that petitioner was required to exercise for his own safety only that degree of care which a reasonable and prudent person would exercise *under the same or similar circumstances*. On appellate review in the state court, this point along with the other points raised was held to be without merit.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, REGINALD L. WILLIAMS, Counsel for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on April 19, 1967, I served a true and correct copy of the foregoing Brief in Opposition to Writ of Certiorari on the Petitioner by mailing a copy thereof in a duly addressed envelope to IRMA ROBBINS FEDER, Attorney for Petitioner, 312 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130.

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